
UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

MISSIONTREK LTD. CO.,

Appellant/Petitioner,

v.

ONFOLIO, INC.,

Appellee/Respondent

PETITION FOR REVIEW OF DECISION OF THE TRADEMARK TRIAL
AND APPEALS BOARD IN CONSOLIDATED OPPOSITION NO.
91165315 AND CANCELLATION NO. 92044538

CORRECTED BRIEF
OF APPELLANT, MISSIONTREK LTD. CO.

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April 25, 2006

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MISSIONTREK LTD: CO: v. ONFOLIO; INC:No. 2006-1271

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

Appellant certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is.

MISSIONTREK LTD: CO:

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

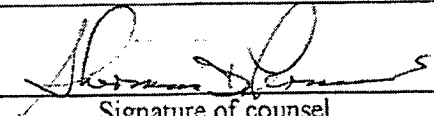
NONE

- 4.
- ☐
- There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

NONEApril 22, 2006

Date


Signature of counselSherman D. Pernia

Printed name of counsel

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II. STATEMENT OF RELATED CASES UNDER RULE 47.5

Attorney for Petitioner states that no other appeal in or from the same proceeding was previously before this Court. Further, no other case is known to counsel to be pending in this or any other court that will directly affect or be directly affected by this court's decision in the pending appeal.

III. JURISDICTIONAL STATEMENT

The Court has jurisdiction in this case under Title 15 U.S.C. §1071(a), as the Court for appeal from a final decision of the Trademark Trial and Appeals Board.

IV. STATEMENT OF THE ISSUES

The issue is whether the Trademark Trial and Appeals Board (TTAB) erred in applying the law when it granted Appellee's Motion for Summary Judgment. More specifically, did Appellant's survey evidence raise a fact issue that preclude summary judgment, particularly at this point in the proceedings prior to discovery having been allowed. Alternatively, does survey evidence

supporting actual confusion trumps speculative assessments of no likelihood of confusion so as to preclude granting of summary judgment. If either of the above is so, the Court must reverse the decision on grant of summary judgment and remand the case to the TTAB for further proceedings.

V. STATEMENT OF THE CASE

In consolidated Opposition No. 91165315 and Cancellation No. 92044538, the TTAB granted Respondent's Motion for Summary Judgment, dismissing the case with prejudice.

VI. STATEMENT OF THE FACTS

In consolidated Opposition No. 91165315 and Cancellation No. 92044538, Appellant/Petitioner is the senior user. Appellee/Respondent has admitted the similarity/identity of the goods. Appellant has submitted evidence of actual confusion by way of an informal survey. This survey indicated that 25% of those surveyed were confused as to the source of the goods. Nevertheless, the TTAB dismissed such survey as not being "credible." The TTAB then applied the *Du Pont* factors to determine that there is no likelihood

of confusion, and then granted Appellee's Motion for Summary Judgment, dismissing the case with prejudice. Appellant filed a timely Notice of Appeal, and subsequently this Brief on Appeal.

VII. SUMMARY OF THE ARGUMENT

The TTAB granted Appellee's Motion for Summary Judgment on the grounds that it appears there is no likelihood of confusion and because the evidence of actual confusion proffered by Appellant was not "credible." Under these facts, in which the similarity of the products is admitted and the Appellant is the senior user and therefore entitled to deference on the issue of likelihood of confusion, the case law of the Federal Circuit should be interpreted in favor of Appellant. The case law at issue here is whether credibility of the evidence of actual confusion is a proper grounds for granting summary judgment in favor of Appellee. Appellant asserts that such grounds are not sufficient under the case law of the Federal Circuit. Consequently, the grant of summary judgment should be reversed and the case remanded for further proceedings before the TTAB.

VIII. ARGUMENT AND STATEMENT OF THE STANDARD OF REVIEW

A. Standard of Review

Appellant asserts that the TTAB erred in applying the law. The Federal Circuit reviews questions of law under the *de novo* standard of review. *Conroy v. Reebok Int'l, Ltd.*, 14 F.3d 1570, 1575, 29 USPQ2d 1373, 1377 (Fed. Cir. 1994).

B. The Trademark Trial and Appeals Board Erred in Accessing the Elements supporting a Grant of Summary Judgment

The TTAB granted Appellee's Motion for Summary Judgment on the grounds that it appears there is no likelihood of confusion and because the evidence of actual confusion proffered by Appellant did not raise an issue of material fact. Under the facts of this case, in which the similarity of the products is admitted¹ and the Appellant is the senior user and therefore entitled

¹ Registrant's admission as to the relatedness of the goods, and the fact that, in summary judgment, all legitimate factual inferences must be made in favor of the nonmovant, require the Board to consider that the products are as identical as asserted by the Petitioner. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986) In this case, consequently, it must be inferred for the sake of this Motion of Summary Judgment that the allegations made by the Appellant are true, namely, that the products are not merely similar or related, but identical. Now, applying the rule that the more

to some deference on the issue of likelihood of confusion (as per the Newcomer Rule²), the case law of the Federal Circuit should be interpreted in favor of Appellant. The case law at issue here is whether the methodology used in performing a preliminary survey of actual confusion is a proper grounds for granting summary judgment in favor of Appellee. Appellant asserts that such grounds are not sufficient under the case law of the Federal Circuit, in particular, as supported in C, i, below. Consequently, the grant of summary

related the goods sold under the respective marks, the more likely that confusion may result, requires that the Court reverse the Board's decision on Summary Judgment, because, given that the products are identical, and include more than one similarity in the trademark, there is more than a *de minimus* material fact issue raised as to likelihood of confusion. *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 350 (9th Cir. 1979).

² Regarding the well-established Newcomer Rule, a newcomer or junior user should not be surprised when conflict arises with a senior user. "It is well-settled that one who adopts a mark similar to the mark of another for closely related goods acts at his peril and any doubt there might be must be resolved against him" *Carlisle Chemical Works, Inc., Hardman & Holden, Ltd.*, 58 CCPA 751, 434 F. 2d 1403, 168 USPQ 110 (1970). See *Tiffany v. National Gypsum Co.*, 59 CCPA 1063, 459 F. 2d 527, 173 USPQ 793 (1972)(rule applies in opposition proceedings). Applying the Newcomer Rule here, where the goods are admittedly identical, a newcomer should be required to exercise extreme caution not to infringe the preexisting rights of principal competitors. This newcomer, Onfolio, has utterly failed at exercising reasonable care. Further, where copying is so obvious, copyright and patent infringement issues are raised which further aggravate the Appellee's lack of good faith. In addition, the determination of good faith is a fact issue which is material in this case as it will determine the standard of good faith here, namely, the efforts the newcomer must take in this case to avoid Appellant's rights. *Bell v. Commercial Insurance Co.*, 3 Cir., 280 F.2d 514. Consequently, on this ground as well, the TTAB's holding must be reversed.

judgment should be reversed and the case remanded for further proceedings before the TTAB.

A second issue is whether any survey evidence of actual confusion trumps speculative assessments of likelihood of confusion so as to preclude granting of summary judgment. In section C, ii, below, it is clear that this is indeed the case. Consequently, the Court should reverse the decision on grant of summary judgment and remand the case to the TTAB for further proceedings.

C. Controlling Case Law in Support of Reversal

i. Credibility of Survey Evidence is Itself a Fact Issue that Precludes Summary Judgment

In the TTAB's statement that "the survey does not raise a genuine issue of material fact with respect to similarities of the parties' respective marks" nonetheless applies a factual inquiry reviewing the methodology applied to and credibility of the survey which preclude the grant of summary judgment. In other words, summary judgment was improper because genuine issues remain as to the credibility of the evidence of actual confusion. *Typewriter Keyboard Corporation v. Microsoft Corporation*, 03-1197, -1255 (Fed. Cir. July 6, 2004).

The TTAB points to a number of facts as supporting its doubts as to the credibility of the proffered evidence. Under the facts of the instant case, in which evidence of actual confusion is submitted, summary judgment should not have been granted. Summary judgment is not appropriate where the opposing party offers specific facts that call into question the credibility of the movant's witnesses. *See Sartor v. Ark. Natural Gas Corp.*, 321 U.S. 620, 628-29 (1944) (reversing summary judgment where the only evidence in support of the movant's contention was the testimony of its experts and there were specific bases for doubting the credibility of that testimony); Charles Alan Wright et al., *Federal Practice & Procedure* § 2726, at 446 (3d ed. 1998) ("[I]f the credibility of the movant's witnesses is challenged by the opposing party and specific bases for possible impeachment are shown, summary judgment should be denied and the case allowed to proceed to trial. . ."); *see also Lodge Music Hall, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 81 (5th Cir. 1987) ("While the mere claim that an affidavit is perjured is insufficient, where specific facts are alleged that if proven would call the credibility of the moving party's witness into doubt, summary judgment is improper."); *In re Citizens Loan & Sav. Co.*, 621 F.2d 911, 913 (8th Cir. 1980) (acknowledging that specific facts tending to discredit a key witness could create a genuine issue for trial).

Here, as in *TypeRight*, one party pointed to specific facts that tend to discredit the testimony of the other party's witnesses. These facts create a genuine issue as to the credibility of such witnesses. "The court may not assess the credibility of testimony when granting summary judgment." *Loral Fairchild Corp. v. Matsushita Elec. Indus. Co.*, 266 F.3d 1358, 1363 (Fed. Cir. 2001); *see also* Fed. R. Civ. P. 56 advisory committee's note (1963 Amendment) ("Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate.").

ii. Survey Evidence Trumps Speculative Assessments of Likelihood of Confusion

Evidence of actual confusion "constitutes persuasive proof that future confusion is likely." *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1251, 1265 (9th Cir. 2001). The 8th Circuit District Court denied a moving party's motion for summary judgment because a consumer survey created an issue of material fact as to whether the non-moving party could prove a likelihood of confusion. The likelihood-of-confusion test has six parts. The court found in the Registrant's favor on five of six of the test parts, including determining that the two marks are not similar. *Nevertheless, the court refused to enter summary*

judgment in the registrant's favor (emphasis added) because the Appellant/Opposant had introduced a consumer survey as evidence of actual confusion -- the sixth part of the likelihood-of-confusion test. *Minnesota Specialty Crops, Inc. v. Minn. Wild Hockey Club, LP*, Civ. No. 00-2317 (D. Minn. 07/26/02) (survey was sufficient to survive summary judgment). *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (stating that summary judgment is appropriate after *adequate time for discovery* and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case).

By disregarding Appellant's evidence of actual confusion, the TTAB denied the Appellant important grounds for relief under the Federal Anti Dilution Statute. The grounds for relief are that there is actual evidence of confusion which should trump any *ad hoc* interpretation of the Board that such evidence should not be considered in a summary judgment hearing as being without credibility.

Thus, it is clear that survey evidence is considered sufficient to survive summary judgment. Appellant offered survey evidence of actual confusion here. Consequently, granting Appellee's Motion for Summary Judgment was not proper and the decision should be reversed.

IX. CONCLUSION AND STATEMENT OF RELIEF SOUGHT

The credibility of Appellant's survey data was a genuine issue of material fact raised in the case. Because a genuine issue of material fact remained in the case, granting of Appellee's Motion for Summary Judgment by the TTAB was not proper.

THEREFORE, Appellant hereby prays that the decision granting Appellee' Motion for Summary Judgment be reversed and the case be remanded to the TTAB for further proceedings.

Appellant: MISSIONTREK LTD. CO.

Date: 5 May 2006

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2006-1271

X. JUDGMENT, ORDER OR DECISION IN QUESTION

THIS OPINION IS NOT CITABLE
AS PRECEDENT OF
THE T.T.A.B.

UNITED STATES PATENT AND TRADEMARK
OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Butler

Mailed: November 29, 2005

Opposition No. 91165315
Cancellation No. 92044538

Missiontrek Ltd. Co.

v.

Onfolio, Inc.

Before Hairston, Chapman and Kuhlke, Administrative Trademark
Judges.

By the Board:

Plaintiff seeks to cancel defendant's registration of the
mark ONFOLIO for "computer software for capturing, organizing and
sharing on-line content."¹ Plaintiff opposes registration of
defendant's mark shown below

ONFOLIO

also for "computer software for capturing, organizing and sharing
on-line content."² As grounds for the complaints, plaintiff
alleges that defendant's marks, when used on the identified
goods, so resemble plaintiff's previously used and registered

¹ Registration No. 2904982, issued November 23, 2004, claiming use and
use in commerce since December 4, 2003. This registration is the
subject of Cancellation No. 92044538.

² Application Serial No. 78350232, filed January 30, 2004 pursuant to
Trademark Act §1(a), claiming use and use in commerce since December
4, 2003. This application is the subject of Opposition No. 91165315.

Opposition No. 91165315 and Cancellation No. 92044538

mark CARTAGIO as to be likely to cause confusion, mistake or to deceive. Plaintiff further alleges that its CARTAGIO mark is registered for "computer software, namely internet navigation software, that is, internet browsers; computer hardware in the nature of database and computer management equipment; internet research and cost accounting software; software for hosting computer servers, and user manuals sold as a unit."³ More particularly, plaintiff alleges that the marks are similar because they both begin with round letters ("C" and "O"); end in the same letters "IO"; "have the same number of letters"; and, when spoken, have the same number of syllables and the same accent.

This case now comes up on defendant's nearly identical motions for summary judgment, filed in each proceeding on July 5, 2005. Defendant's motions were filed prior to the due dates for its answer in each case. Plaintiff filed nearly identical responses to the summary judgment motions, and defendant replied thereto in each case. Before turning to the summary judgment motions, the Board addresses some preliminary matters.

The Board has reviewed both of the above-identified proceedings and finds that consolidation is appropriate inasmuch as the two proceedings involve the same parties and common questions of law and fact. Consolidation may be ordered on the Board's own initiative. See Fed. R. Civ. P. 42(a); *Regatta*

³ Registration No. 2756245, issued August 26, 2003, and claiming use and use in commerce since September 15, 2001.

Opposition No. 91165315 and Cancellation No. 92044538

Sports Ltd. v. Telux-Pioneer, Inc., 20 USPQ2d 1154 (TTAB 1991); *Estate of Biro v. Bic Corp.*, 18 USPQ2d 1382 (TTAB 1991); and TEMP §511 (2d ed. rev. 2004). The Board may exercise its discretion in ordering consolidation prior to joinder of issue (i.e., before an answer has been filed in each case). See TEMP §511 (2d ed. rev. 2004). Here we find consolidation prior to joinder of issue is appropriate.

Accordingly, Opposition No. 91165315 and Cancellation No. 92044538 are hereby consolidated and may be presented on the same records and briefs. The record will be maintained in Opposition No. 91165315 as the "parent" case, but all papers filed in these cases should include both proceeding numbers in the order shown in the caption of this consolidated case.

Plaintiff separately sought to suspend both proceedings pending disposition of a third-party cancellation proceeding (Cancellation No. 92044856 between plaintiff herein, as petitioner, and Peter Cordes, as defendant). This latter proceeding involves a registration for the mark PROVISO. Plaintiff's motion to suspend, filed on September 21, 2005 in Cancellation No. 92044538, was denied by order of the Board dated September 23, 2005. In denying the motion, the Board determined that plaintiff "utterly fail[ed] to demonstrate that Cancellation No. 92044856 has anything to do with this proceeding, except that petitioner happens to be involved in both cases." (Emphasis in the original.) Plaintiff's motion to suspend, filed August 24,

Opposition No. 91155315 and Cancellation No. 92044538

2005 in Opposition No. 91155315 is hereby denied for the same reasons.

For purposes of its summary judgment motions,⁴ defendant concedes the relatedness of the parties' respective goods. Defendant clarifies that it seeks judgment in its favor as a matter of law on the premise that the involved marks are so dissimilar that there is no likelihood of confusion.

In support of its motion, defendant argues that no genuine issues of material fact exist as to likelihood of confusion because the marks are completely distinct in sound, appearance, connotation, and commercial impression; and that the dissimilarity of the marks so outweighs the other *DuPont* factors⁵ that it is dispositive. Defendant argues that the involved marks do not, as plaintiff alleges, have the same number of letters; that the only common element in the parties' respective marks is the suffix "IO," which is an ordinary English language suffix found in numerous registered marks for hardware and software; that such suffix is derived from Latin, a constituent language of English; and that "IO" is "added to the stem of the perfect passive participle of a verb to create a verbal noun indicating an action." Defendant contends that the marks, when spoken, are significantly different in pronunciation and, thus, do not sound alike or even similar. Defendant argues that the root terms of

⁴ The summary judgment motions may be referred to in the singular, *infra*.

⁵ See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Opposition No. 91165315 and Cancellation No. 92044538

each party's marks differ, with plaintiff admitting, in response to the Examining Attorney's inquiry as to any meaning of the term CARTAGIO (at the time that pleaded Registration No. 2756245 was pending as an application), that there is no translation of the term and that "... CARTAGIO has no known meaning, other than its being similar to an old Latin name of the city of Carthage, Tunisia." Defendant contends that the root of its marks, FOLIO, on the other hand, means "a leaf of paper ..., a leaf-number of a book, a sheet of paper folded once, making two leaves of a book, [or] a book made of such sheets." Thus, because the marks suggest different meanings, defendant argues that the marks have different commercial impressions, arguing further that its ONFOLIO marks are likely to be seen as a variant of the term "portfolio." Defendant also points out that the design element of one of its marks further supports the visual dissimilarities between plaintiff's mark and defendant's ONFOLIO and design mark.

Defendant's motion is accompanied by excerpts from an on-line dictionary definition of the suffix "io"; a listing from Thomson CompuMark of registrations and pending applications of marks containing terms ending in "io"; USPTO's TARR printouts of registered marks containing terms ending in "io"; a copy of plaintiff's response to the Examining Attorney's inquiry as to whether CARTAGIO has any translation or meaning; and a dictionary definition of the term "folio."

In response, plaintiff argues that actual confusion exists based on a survey it conducted which demonstrated that "... 25% of

the respondents indicated that the product names are so similar that it is likely that the products come from the same source"; and that defendant's motion must fail because defendant did not "... identify the elements of its adversary's case with respect to which it considers there to be a deficiency of proof." Plaintiff further contends that the marks, when written, look similar because the beginning and ending letters are round (C/O vs. O/O); that when spoken aloud, the accents on the words are similar; and that, when written in lower case, "... there are two letters in the middle portion of the marks having appendages that extend beyond the normal limits of a lower-case letter, namely the T and G of Cartagio, and the F and L of Onfolio." Plaintiff argues that its mark is well-established, though it states it does not know whether its mark is famous; and that defendant is the junior user, who adopted a similar mark for closely related goods and did not exercise good faith in avoiding the rights of others, particularly its competitors' pre-existing products.⁶ Plaintiff's response is accompanied by the declaration of its director concerning the survey conducted and a copy of the survey inquiry sent to the recipients by email.

In reply, defendant argues that it did present adequately the elements forming the basis of its summary judgment motion;

⁶ Plaintiff, at page 5 of its response to defendant's motion for summary judgment, requests discovery. To the extent, if any, that plaintiff seeks discovery pursuant to Fed. R. Civ. P. 56(f), such request is denied inasmuch as plaintiff responded on the merits to defendant's motion for summary judgment. See *Ron Cauldwell Jewelry, Inc. v. Clothesline Clothes, Inc.*, 63 USPQ2d 2009 (TTAB 2002).

and that plaintiff's arguments concerning the similarities of the marks are "peculiar" and without support. Defendant contends that plaintiff's survey is not entitled to any consideration because it is inexpert and biased in design and administration; it fails to specify or provide any information regarding the respondents; it fails to provide the actual responses; it fails to approximate actual market conditions; it fails to present defendant's design mark; and it makes leading inquiries.

In a motion for summary judgment, the moving party has the burden of establishing the absence of any genuine issues of material fact and that it is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). A genuine issue with respect to material fact exists if sufficient evidence is presented that a reasonable fact finder could decide the question in favor of the non-moving party. See *Opryland USA Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992). Thus, all doubts as to whether any factual issues are genuinely in dispute must be resolved against the moving party and all inferences must be viewed in the light most favorable to the non-moving party. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

In the present case, the Board finds that defendant has established the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law. The circumstances here are similar to those in *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 146 F.3d 1273, 47 USPQ2d

1459 (Fed. Cir. 1998) and *Kellogg Co. v. Pack'em Enterprises, Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991), in that the single *DuPont* factor of the dissimilarity of the marks in their entireties substantially outweighs any other relevant factors and is dispositive of the issue of likelihood of confusion.

Moreover, we find that plaintiff's survey does not raise a genuine issue of material fact with respect to the similarities of the parties' respective marks. According to the statement of plaintiff's director, he:

... prepared an email survey of 42 persons who had recently downloaded our CARTAGIO software and who otherwise were believed to be able to provide Petitioner with an objective opinion on the issue of likelihood of confusion.

Of the 42 emails sent, 8 responses to the question were received. Of these 8 responses, two indicated actual confusion and six indicated no confusion. Of those that indicated actual confusion, one is a manager of a software sales company and may have already known about ONFOLIO, so, perhaps, his response indicating no confusion can be ignored. In any case, still counting this one likely invalid response, a full 25% of those surveyed indicated confusion. (Emphasis in the original.)

The inquiry sent by plaintiff's director, asks the following:

With respect to a recently released online research/knowledge management product, called ONFOLIO, which of the below statements is most likely to be true?

- a. Because the product names are similar, ONFOLIO is likely a licensee of Missiontrek, the developer of CARTAGIO.
- b. Because the product names are similar, ONFOLIO is likely a product of Missiontrek, adapted for a particular niche market.
- c. I see no similarity at all. Consequently, there is likely no relationship between the products.

Opposition No. 91155315 and Cancellation No. 92044538

The number of respondents (2) that indicated they may be confused vis-à-vis the number of acknowledged inquiries sent (42) mathematically does not amount to the inflated percentage calculated by plaintiff (25%) of respondents possibly confused. We observe, too, that the survey, at a minimum, is not based on established or recognized survey techniques; was prepared and administered by a biased party; and was not analyzed in any statistically meaningful way. See, for example, *Hilson Research, Inc. v. Society for Human Resources Management*, 27 USPQ2d 1423 (TTAB 1993); and 5 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §§32.158-32.196 (4th ed. 2005).

Accordingly, defendant's motions for summary judgment are granted; judgment is entered against plaintiff in both proceedings; Opposition No. 91155315 is dismissed with prejudice; and Cancellation No. 92044538 is denied with prejudice.

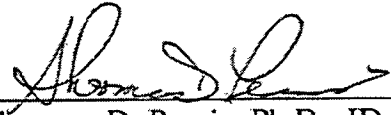
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XI. PROOF OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above Brief of Appellant is being served on the Appellee's Principal Attorney of Record, on the General Counsel of the US Patent and Trademark Office, and on the Trademark Trial and Appeal Board, in accordance with the Federal Rules of Appellate Procedure on

30 May, 2006.


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Mail Service under FRAP Rule 25(c)(4)


**XII. CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

The brief contains less than 2,200 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

The brief has been prepared in a proportionately spaced typeface using Corel WordPerfect version 12 in font size 14 Times New Roman type style.



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